RIGHTS IN LITERARY PROPERTY. — Wholly apart from statute, the author of every original work [1] of literature, science, or art,[2] has therein well-recognized legal rights. So soon as he has embodied his concept in a material form which renders it capable of identification, the common law [3] secures to him the product of his intellectual labors. He has the option of withholding it altogether from the knowledge of others or of originally giving it to the world.[4] And this control of the first publication is independent of any property in the material object which records and preserves his thought. Its basis is a right of property [5] in something incorporeal, — the arrangement and connection of words and ideas in a literary composition, or the collocation of sounds in a musical composition, — which vests irrespective of the intrinsic merits of the composition or of any intention on the author's part to publish it.[6] This property is subject to the same rules of transfer [7] and succession [8] which govern all other personal property.[9] It is protected by the same remedies [10] in so far as they are applicable. Once the author makes a general publication of his work, however, it becomes *publici juris*, and all the individual's rights in it at common law are extinguished.[11] Any communication or disclosure by the author which permits an unrestricted use of the subject matter by the public, or by those members of the public to whom it may be committed, is a general publication.[12] Thereafter the only protection afforded to the author is that which he may have secured by complying with the copyright laws. Such compliance assures to the author, as a substitute for the common-law rights which he must surrender, narrower rights to be measured by the terms of the

[1] This statement is sometimes made with the qualification that the work must be innocent in character. In Southey *v.* Sherwood, 2 Meriv. 435 (1817), an injunction was denied on the ground that the poem in question was libelous, for which reason the plaintiff would be barred from a recovery at law. There may be a sound policy in denying the protection of the copyright laws to one who publishes immoral, blasphemous, or libelous matter. But it is another thing to refuse an injunction to an author seeking to suppress all publication of the same. See SHORTT, LAW OF LITERATURE, 2 ed., 6.

[2] These rights may be had in books, dramatic or musical compositions, paintings, etchings, or other artistic or literary productions. See WEIL, COPYRIGHT LAW, § 267.

[3] These common-law rights have been abrogated in England by the Copyright Act of 1911, 1 & 2 GEO. 5, c. 46, § 31. The Act gives Copyright in unpublished as well as in published works (*id.*, § 1) for the life of the author and for a period of fifty years after his death (*id.*, § 3). See [1911] L. R. STAT. 182.

[4] Bartlett *v.* Crittenden, 5 McLean (U. S.) 32 (D. Ohio, 1849); Palmer *v.* De Witt, 47 N. Y. 532 (1872); Prince Albert *v.* Strange, 2 De G. & Sm. 652 (1848). See Sanborn, J., in Harper Bros *v.* Donahue & Co., 144 Fed. 491, 492 (N. D. Ill., E. D., 1905).

[5] Palmer *v.* De Witt, *supra*. See Warren and Brandeis, "The Right to Privacy," 4 HARV. L. REV. 193, 205: " . . . the protection afforded to thoughts, sentiments and emotions, so far as it consists in preventing publication, is merely an instance of the enforcement of the more general right of the individual to be let alone."

[6] Woolsey *v.* Judd, 4 Duer (N. Y.) 379 (1855); Baker *v.* Libbie, 210 Mass. 599, 97 N. E. 109 (1912).

[7] See *infra*, n. 14.

[8] Queensberry *v.* Shebbeare, 2 Eden 329 (1758).

[9] An able court has held literary property not to be leviable. Dart *v.* Woodhouse, 40 Mich. 399 (1879).

[10] See Mansell *v.* Valley Printing Co., [1908] 2 Ch. 441, 446.

[11] Wheaton *v.* Peters, 8 Pet. (U. S.) 591 (1834); Holmes *v.* Hurst, 174 U. S. 82, 85 (1899).

[12] *Cf.* Werckmeister *v.* American Lithographic Co., 134 Fed. 321 (2d. Circ., 1904).

particular statute.[13] Originally designed to protect the author's pecuniary interest in subsequent printings of his manuscript, copyright acts have uniformly granted a limited monopoly on the multiplication and disposition of copies thereof. The present American Act goes further, but it is at least doubtful whether even it covers all possible methods of reproduction.

The right of sale and transfer, an inseparable incident of all chattel property, attaches equally to literary property.[14] An author may sell his work, absolutely or conditionally.[15] The absolute sale and delivery of an unpublished manuscript carries with it *prima facie* the right to the first publication, but is not in itself a publication unless the parties so intend it.[16] However, parting with the manuscript does not necessarily involve a surrender of the right to publish, which may separately be transferred or retained.[17] If the author confers rights in any manner, reserving to himself the control of the first publication, the result is a mere license.[18] On the other hand, an assignment [19] without reservation vests the entire property in the assignee.[20] The latter has the right to publish the manuscript in the original or in an altered form, without incurring any liability in trespass to the author.[21]

A recent New York case [22] furnishes an interesting application of the foregoing principles. The defendant composer of a song sold all his rights therein to the plaintiff. He then copyrighted the composition under a slightly different name, sold copies of it, and licensed other defendants to reproduce it upon phonograph records. The court on demurrer rightly held that the plaintiff was upon these allegations entitled to injunctive relief against all the defendants. The sale vested in him the right to the first publication. The composer, having left no interest whatsoever in the subject matter, did not better his position by the attempted copyrighting.[23] Obviously, the printing and vending of copies by this wrongdoer could not constitute a general publication,[24] which the statute makes a condition to the obtaining of a copyright.[25]

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[13] *Cf.* Bobbs-Merrill Co. *v.* Straus, 147 Fed. 15 (2d. Circ., 1906).

[14] Parton *v.* Prang, 3 Cliff. (U. S.) 537 (D. Mass., 1872). See Palmer *v.* De Witt, 47 N. Y. 532, 540 (1872); See WEIL, COPYRIGHT LAW, § 277–282.

[15] Press Pub. Co. *v.* Monroe, 73 Fed. 196, 198 (2d. Circ., 1896); *Cf.* Paige *v.* Banks, 13 Wall. (U. S.) 608, 614 (1871).

[16] Parton *v.* Prang, *supra.*, at 550.

[17] American Tobacco Co. *v.* Werckmeister, 207 U. S. 284 (1907).

[18] See Werckmeister *v.* American Lithographic Co., *supra*, at 325; Daly *v.* Walrath, 40 App. Div. 220, 57 N. Y. Supp. 1125 (1899). *Cf.* Public Ledger *v.* New York Times, 275 Fed. 562 (S. D. N. Y., 1921).

[19] An oral assignment is valid in the absence of statute. Callaghan *v.* Meyers, 128 U. S. 617, 658 (1888); White-Smith Pub. Co. *v.* Apollo Co., 139 Fed. 427, 429 (S. D. N. Y., 1905).

[20] Dam *v.* Kirk La Shelle Co., 175 Fed. 902, 904 (2d. Circ., 1910); Am. Law Book Co. *v.* Chamberlayne, 165 Fed. 313 (2d. Circ., 1908).

[21] Am. Law Book Co. *v.* Chamberlayne, *supra.*

[22] Kortlander *v.* Bradford *et. al.*, 190 N. Y. Supp. 311 (Sup. Ct., 1921). For the facts of this case see RECENT CASES, *infra*, p. 622.

[23] Ferris *v.* Frohman, 223 U. S. 424, 437 (1912); Dielman *v.* White, 102 Fed. 892 (D. Mass., 1900).

[24] Boucicault *v.* Wood, 3 Fed. Cas. No. 1693 (N. D. Ill., 1867).

[25] See 1916 U. S. COMP. STAT. ANN., § 9530 (Act March 4, 1909 c. 320, § 9). See

It follows that the defendant having no rights, common-law or statutory, could by license confer none upon his co-defendants. The making of phonograph records of the song, therefore, clearly constituted an infringement of the plaintiff's common-law right to the first publication. The potential difference between the scope of this right and of those conferred by copyright laws becomes here apparent. The latter are limited and defined according to the terms and interpretation of the Act. Thus the reproduction of a song by mechanical devices has been held not to violate the exclusive right of printing and vending copies conferred by a statute.[26]

CONFORMITY BY FEDERAL COURTS TO STATE PROCEDURE. REV. STAT., § 914. — In determining when under the Conformity Act the federal courts will follow the state procedure, the better course is to assume they will do so in all cases, unless the particular subject matter falls within some exception to the operation of the statute, and then to find what the exceptions are. The first limitation on the statute's operation is that imposed by the words of the statute itself. It is to apply only to civil causes, other than those in equity and admiralty,[1] which can be assimilated to some cause known to the practice of the state courts.[2] When such like cause is found the statute applies from the bringing of the writ[3] to the rendition of judgment,[4] irrespective of the fact that the cause

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also Universal Film Mfg. Co. *v.* Copperman, 212 Fed. 301, 302 (S. D. N. Y., 1914); WEIL, COPYRIGHT LAW, 393–396, 729–736.

[26] Stern *v.* Rosey, 17 App. D. C. 562 (1901). *Cf.* White-Smith Pub. Co. *v.* Apollo Co., *supra*. See 19 HARV. L. REV. 134. However, the present federal statute makes the unauthorized reproduction of a song by mechanical devices an infringement of copyright. See 1916 U. S. COMP. STAT. ANN., § 9517 (e).

[1] Proceedings in equity and admiralty causes are governed by rules promulgated by the United States Supreme Court. See REV. STAT., § 917. See Equity Rules, 226 U. S. 629; Admiralty Rules, 254 U. S. 673. A state statute allowing equitable and legal causes to be combined will not be followed. Scott *v.* Neeley, 140 U. S. 106 (1891). Nor one allowing equitable defenses in actions at law. Scott *v.* Armstrong, 146 U. S. 499, 512 (1892); Jewett Car Co. *v.* Kirkpatrick Constr. Co., 107 Fed. 622 (D. Ind., 1901). But equitable defenses may now be used in all federal courts. JUDICIAL CODE, § 274b. See 35 HARV. L. REV. 345. Nor do federal courts follow state practice in criminal proceedings. Bryant *v.* United States, 257 Fed. 378, 388 (5th Circ., 1919). Proceedings begun by attachment, to collect penalties, and to establish a will are civil causes within this statute. Citizens' Bk. *v.* Farwell, 56 Fed. 570 (8th Circ., 1893); Atlantic, etc. R. Co. *v.* United States, 168 Fed. 175 (4th Circ., 1909); Sawyer *v.* White, 122 Fed. 223, 227 (8th Circ., 1903).

[2] When no such analogy can be found, as in actions to confiscate property for the violation of revenue laws, the statute does not apply. Coffey *v.* United States, 117 U. S. 233 (1886); United States *v.* Fourteen Pieces of Embroidery, 155 Fed. 651 (E. D. N. Y., 1907).

[3] The substance of the writ is tested by the state practice. Brown *v.* Chesapeake & Ohio Canal Co., 4 Fed. 770 (D. Md., 1880). The form of the writ is, however, governed by federal statute. See REV. STAT., § 911.

[4] See cases cited, note 19, *infra*. Execution and proceedings supplemental thereto are governed by federal statutes. See REV. STAT., §§ 915, 916. Lamaster *v.* Keller, 123 U. S. 376, 389 (1887); Kaill *v.* Board of Directors, 194 Fed. 73 (5th Circ., 1912). See Chateaugay Iron Co., Petitioner, 128 U. S. 544, 554 (1888). These statutes give remedies similar to those existing in the states, as of the time these statutes were passed. The Conformity Act contains no such limitation.